

IN THE SUPREME COURT OF FIJI
 Appellate Jurisdiction
 Criminal Appeal No. 35 of 1958

SUKHRAJI

Appellant

AND

KALIKA PRASAD

Respondent

Cases stated under s. 38 Magistrates' Courts Ordinance—Maintenance (Summary Jurisdiction) Ordinance, (Cap. 31)—second complaint by a wife on same grounds as before with ground of adultery added—estoppel as regards evidence as to previous grounds—*res judicata*—whether estopped on additional ground of adultery—procedure to be adopted under s. 10 of Ordinance—subsequent procedure to be followed.

Held.—(1) Under s. 38 of the Magistrates' Courts Ordinance the parties to proceedings have no rights to require a case to be stated.

(2) Wife might not be estopped from giving evidence as to a ground of complaint not raised by her in previous proceedings.

(3) Applications under s. 10 of the Maintenance (Summary Jurisdiction) Ordinance are made by way of complaint.

(4) Following the lodging of a complaint under s. 10 the procedure can follow in the forms provided in the Summary Jurisdiction Act, 1848, re-enacted in the Summary Jurisdiction (Separation and Maintenance) Act, 1895 to 1925, and adapted for local purposes.

(5) Authority for using English forms is provided by s. 47 of the Magistrates' Courts Ordinance.

Case referred to:—

Conquer v. Boot, (1928), 2 K.B., 336.

References:—

Separation and Maintenance (Summary Jurisdiction) Ordinance.

Phipson, 9th Edition, 435.

The Magistrates' Courts Ordinance.

The Summary Jurisdiction Act, 1848.

The Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

LOWE, C.J. [12th August, 1958]—

The learned Magistrate at Nausori has stated a case for the opinion of this Court on matters which relate to the right of a party to proceedings before him to lead certain evidence in a subsequent action after being unsuccessful in a similar action based on such evidence.

The history of events is that a wife filed a complaint in the Nausori Magistrate's court alleging desertion by her husband and his wilful neglect to provide maintenance for herself and her children, contrary to section 3 of the Separation and Maintenance (Summary Jurisdiction) Ordinance, (Cap. 31).

The Magistrate who received the complaint reduced it to a formal "charge" setting out the statement of offence and particulars of offence as in a criminal charge. The matter then came before the then Senior Magistrate at Nausori who dismissed the application on the grounds that the wife had not proved the charges against her husband.

About two years later the wife brought a further complaint before another Magistrate at Nausori containing the same allegations and an additional one of adultery and again the matter was reduced to statement of offence and particulars of offence as in a formal "charge". It is this matter which came before the present learned Magistrate at Nausori.

After the wife gave evidence, during which she admitted that at the time of making the first complaint she knew of the adultery which she had added merely in the second complaint, Counsel for the respondent husband objected that the whole matter was *res judicata* and for that reason the wife was estopped from bringing another action based on grounds on which she had failed in the first action and the further ground of adultery of which she was aware at the time but which she did not include in that action.

I have no right to express an opinion as to the merits of the submitted legal arguments for reasons which appear later but the learned Magistrate is referred to Phipson, 9th Edition, 435. The facts as to the adultery could not have been given in evidence in the first case as the adultery was not in issue. The learned author refers to many cases, including *Conquer v. Boot*, (1928), 2 K.B., 336, which might have some application as to the wife's right to give evidence of adultery but not as to issues previously decided.

The learned Magistrate at the request of the wife, made his application for a case stated under section 38 of the Magistrates' Courts Ordinance, which is as follows:—

"In addition to and without prejudice to the right of appeal conferred by this Ordinance, a magistrate may reserve for consideration by the Supreme Court, on a case to be stated by him, any question of law which may arise on the trial of any suit or matter, and may give any judgment or decision subject to the opinion of the Supreme Court, and the Supreme Court shall have power to determine, with or without hearing argument, every such question."

It will be seen that this section gives no right to either of the parties to require a case to be stated when an appeal lies. It is a matter entirely in the Magistrate's own hands. In the instant case the Magistrate would appear to have been in some doubt on the question of the application of the law of estoppel involved, and section 38 makes it clear that he can take action by stating a case, giving any judgment or decision subject to the opinion of this Court on the case stated.

The record shows that the Magistrate has determined the matter by dismissing the wife's application with no reservation, so the opinion of the Court in these circumstances can have no bearing on such final adjudication, nor can this Court express a binding opinion in these circumstances.

The practice, which appears to be common in Magistrates' courts, of drawing up formal "charge" should not be followed in future as it tends to give the impression that the matter is quasi criminal.

The relevant portion of section 10 of the Separation and Maintenance (Summary Jurisdiction) Ordinance is as follows:—

"All applications under this Ordinance shall be made in accordance with the provisions of the Criminal Procedure Code. . . ."

That means merely that the applications are to be made by way of complaint, as with a normal complaint made to a Magistrate, under the provisions of the Criminal Procedure Code. The section does not say that any further procedure under the Code shall apply.

Thereafter the form provided in the Summary Jurisdiction Act, 1848, and re-enacted in the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, should be used and adapted to suit the circumstances and then served on the husband of a wife applicant as a summons. The form partially adapted is as follows:—

SUMMONS for order: wife's application: general grounds.

In the Magistrate's Court at

To (name and address of defendant)

THE SEPARATION AND MAINTENANCE (SUMMARY
JURISDICTION) ORDINANCE (CAP. 31)

COMPLAINT has been made this day by (insert full names) (hereinafter called the Complainant), a married woman residing at within the said division, for that you, being the husband of the said Complainant—(deserted your wife on the day of 19) (have been guilty of persistent cruelty to your wife and/or her children) (have wilfully neglected to provide reasonable maintenance for your wife or her infant children whom you are legally liable to maintain) (are an habitual drunkard) (while suffering from a venereal disease and knowing you were so suffering insisted upon having sexual intercourse with your wife) (compelled your wife to submit herself to prostitution) (have been guilty of adultery, the particulars of which are set out in the accompanying statement marked " A ") (were on the day of 19 , duly convicted by the Magistrate's Court sitting at of an aggravated assault upon her, the said Complainant, your wife) (were on the day of 19 , convicted by of an assault on her, the said Complainant, your wife, and sentenced to a term of imprisonment exceeding two months)

YOU ARE THEREFORE hereby summoned to appear before the Magistrate's Court sitting at on (insert some day, being a reasonable time after the date of the summons and after the day when the same can be served), at the hour of in the noon, to answer to the said Complaint, and to show cause why an Order or Orders should not be made upon you under the provisions of the Separation and Maintenance (Summary Jurisdiction) Ordinance (Cap. 31).

Dated the day of 19

MAGISTRATE.

In this Colony no specific form has been provided by rules made, under the relevant provision of the Criminal Procedure Code, to apply to complaints made under the Separation and Maintenance (Summary Jurisdiction) Ordinance and for that reason the appropriate provisions of the Magistrates' Courts Ordinance must be invoked for authority for the use of the English form.

Section 47 of the Magistrates' Courts Ordinance states:—

“ The jurisdiction vested in magistrates shall be exercised (so far as regards practice and procedure) in the manner provided by this Ordinance and the Criminal Procedure Code, or by such rules and orders of court as may be made pursuant to this Ordinance and the Criminal Procedure Code, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the county courts and courts of summary jurisdiction.”

From this it will be seen that a practice and procedure observed in England in Courts of Summary Jurisdiction can be used where there is a *hiatus* in the provisions as to a similar procedure in this Colony.

For that reason there can be no objection to adapting the relevant English form of summons to follow a complaint made under Chapter 31.